

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHNATHAN SAMUELS,	§
	§
Defendant Below-	§ No. 612, 2009
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 0706037589
Plaintiff Below-	§
Appellee.	§

Submitted: April 12, 2010

Decided: June 16, 2010

Before **BERGER, JACOBS**, and **RIDGELY**, Justices.

ORDER

This 16th day of June 2010, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) On October 6, 2009, the defendant-appellant, Johnathan Samuels (Samuels), was found to have violated the terms of his probation. The Superior Court sentenced Samuels on the VOP, and this appeal followed.

(2) Samuels' counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Samuels' counsel asserts that, based upon a complete and careful examination of the record, there are no arguably

appealable issues. By letter, Samuels' attorney informed him of the provisions of Rule 26(c) and provided Samuels with a copy of the motion to withdraw and the accompanying brief. Samuels also was informed of his right to supplement his attorney's presentation. Samuels raises two issues for this Court's consideration. The State has responded to Samuels' points, as well as to the position taken by Samuels' counsel, and has moved to affirm the Superior Court's judgment.

(3) The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) this Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.¹

(4) The record reflects that Samuels pled guilty on November 8, 2007 to one count of second degree robbery. He was sentenced to five years at Level V incarceration to be suspended after serving one year for four years at decreasing levels of supervision. In June 2008, he was arrested on

¹ *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

new criminal charges and pled guilty on October 1, 2008 to possession of a schedule II controlled substance. The same day, he was found in violation of the probation associated with his second degree robbery conviction. The Superior Court sentenced Samuels on the drug charge to one year at Level V incarceration to be suspended immediately for one year at Level III probation. On the VOP, the Superior Court sentenced Samuels to five years at Level V incarceration, to be suspended after serving six months for eighteen months at Level III probation.

(5) In August 2009, another VOP report was filed. Following a hearing on October 6, 2009, the Superior Court again found Samuels in violation of the terms of his probation and resentenced him on the second degree robbery charge to four years at Level V incarceration, to be suspended after serving two years with no probation to follow. The Superior Court discharged Samuels as unimproved from the probation association with his drug possession conviction.

(6) In his opening brief on appeal, Samuels argues that the Superior Court abused its discretion by imposing an excessive sentence upon him. Samuels also argues that the trial judge sentenced him with a closed mind because the court departed from the sentencing guidelines without stating in

particular the reason for the upward departure. We find no merit to either claim.

(7) With respect to Samuels' claim that his sentence was excessive, the Superior Court, in fact, could have imposed a penalty of three and a half years at Level V incarceration² but instead sentenced him to two years at Level V incarceration with no probation to follow. To disturb a sentence on appeal, there must be a showing either of the imposition of an illegal sentence or an abuse of the sentencing judge's discretion.³ In this case, we find neither. Nonetheless, we do find that the Superior Court judge misspoke when stating that four years remained to be served on Samuels' original sentence for second degree robbery. In fact, Samuels had served one year in prison following his initial sentencing year and had served an additional six months following his first VOP. Consequently, the balance of Samuels' original sentence was only three and a half years. Accordingly, the Superior Court's sentencing order needs to be corrected to reflect that

² The Superior Court originally sentenced Samuels to five years in prison, but suspended the period of incarceration after one year. Samuels also served an additional six months at Level V following his first VOP. Accordingly, having served eighteen months in prison on his original sentence, the Superior Court could have imposed up to, without exceeding, the three and a half years remaining on his original sentence. *See Pavulak v. State*, 880 A.2d 1044, 1045-46 (Del. 2005).

³ *Weber v. State*, 655 A.2d 1219, 1221 (Del. 1995).

Samuels' has been credited with all of the time previously served on his original sentence.

(8) Samuels' second claim is that the judge sentenced him with a closed mind because she failed to state the particular reasons she was departing from the sentencing guidelines. We find no support for this argument. After Samuels admitted to the VOP charge, the judge listened to Samuels' arguments in mitigation. Prior to sentencing Samuels, the judge noted his lengthy criminal history, the seriousness of the charged offense and his history of probation violations. Under the circumstances, we find no support for Samuels' contention that the judge exhibited a closed mind in sentencing him.

(9) This Court has reviewed the record carefully and has concluded that Samuels' appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Samuels' counsel has made a conscientious effort to examine the record and the law and has properly determined that Samuels could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The matter is REMANDED to the Superior Court for correction of the sentencing order to reflect credit to Samuels for all time

previously served on his original sentence. The judgment of the Superior Court is otherwise AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice